

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GABRIEL MENDEZ,

Petitioner,

04-Civ-9694 (WHP) (DFE)

-against-

WILLIAM R. LAPE, Superintendent of
Marcy Correctional Facility,

REPORT AND RECOMMENDATION
TO JUDGE PAULEY

Respondent.

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DOUGLAS F. EATON, United States Magistrate Judge.

On January 5, 2005, Judge Pauley referred Mr. Mendez's habeas corpus petition to me to write a Report and Recommendation on the merits of the petition. On February 7, 2005, I issued a scheduling order; Paragraph 6 said:

If Mr. Mendez has any change in his mailing address, he must, within 5 business days, send written notice to me and to the attorney for respondent.

By letter dated April 30, 2005, Mr. Mendez informed our Court's Pro Se Office that he was transferred to the Queensboro Correctional Facility. On May 12, 2005, the Clerk's Office docketed the address change. On May 27, 2005, Mr. Mendez was released on presumptive supplemental merit parole. He did not notify the Pro Se Office, or me, or the State Attorney General's Office about his release from prison. On June 8, 2005, Assistant Attorney General Alyson J. Gill mailed her Memorandum of Law in Opposition and her Declaration in Opposition to Mr. Mendez's former prison, the Marcy Correctional Facility. The Postal Service returned those papers to her office.

On August 9, 2005, after my law clerk searched the inmate locator to verify Mr. Mendez's address, I learned for the first time that Mr. Mendez had been released on parole. At my law clerk's request, AAG Gill obtained Mr. Mendez's new address -- 172 Milford Street, Basement Apt., Brooklyn, NY 11208-2416. On August 10, 2005, AAG Gill re-served her papers to Mr. Mendez at his new address.

In a Memorandum and Order dated August 12, 2005, I wrote:

I direct Mr. Mendez to send a letter to me, by August 31, 2005, stating whether or not he wishes to proceed with his habeas petition. If I do not receive any answer, then I will deem that Mr. Mendez has withdrawn his petition. If Mr. Mendez sends me timely written notice that he wishes to proceed with his habeas petition, then I hereby give him until September 30, 2005 to serve and file either (a) a reply/traverse or (b) a letter stating that he chooses to submit no reply/traverse but wishes me to write a Report and Recommendation to Judge Pauley based on the papers already received.

I presume Mr. Mendez received my Memorandum and Order because the U.S. Postal Service did not return it to me.

To date, I have not received any response from Mr. Mendez to my August 12, 2005 Memorandum and Order. On September 14, 2005, my law clerk checked with the Court's Pro Se Office to see if they received any papers or calls from Mr. Mendez after August 12; they did not. On September 14, my law clerk also called AAG Gill to see if: (1) the papers she re-served to Mr. Mendez on August 10 were returned to her office by the U.S. Postal Service; and (2) she received a response from Mr. Mendez to my August 12 Memorandum and Order. Ms. Gill told my law clerk that respondent's papers were not returned to her office, and that she did not receive any response from Mr. Mendez to my August 12 Memorandum and Order.

Accordingly, I recommend that Judge Pauley dismiss Mr. Mendez's habeas petition pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, any party may object to this recommendation within 10 business days after being served with a copy (i.e. by October 3, 2005), by filing written objections with the Clerk of the U.S. District Court and mailing copies (a) to the opposing party, (b) to the Hon. William H. Pauley III, U.S.D.J. at Room 2210, 500 Pearl Street, New York, NY 10007 and (c) to me at Room 1360, 500 Pearl Street. Failure to file objections within 10 business days will preclude appellate review. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), and 6(e). Any request for an extension of time must be addressed to the

District Judge.

Douglas F. Eaton

DOUGLAS F. EATON
United States Magistrate Judge
Room 1360, U.S. Courthouse
500 Pearl Street
New York, NY 10007
Telephone: (212) 805-6175

Dated: New York, New York
September 14, 2005

Copies of this Report and Recommendation were mailed on this date to:

Gabriel Mendez
172 Milford Street, Basement Apt.
Brooklyn, NY 11208-2416

Alyson J. Gill, Esq.
Assistant Attorney General
120 Broadway
New York, New York 10271

Hon. William H. Pauley, III